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BEFORE THE
SURFACE TRANSPORTATION BOARD

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION Complainant, v. NORFOLK SOUTHERN RAILWAY COMPANY Defendant.	)	Docket No. NOR 42128

NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY TO SMEPA'S FIRST MOTION TO COMPEL DISCOVERY

Defendant Norfolk Southern Railway Company ("NS") hereby submits its Reply to Complainant South Mississippi Electric Power Association's ("SMEPA's") First Motion to Compel Discovery. At the outset, it is useful to note the matters about which the parties are in agreement. First, NS agrees that traffic and event records that SMEPA has requested in discovery are relevant and important to the development of a Stand-Alone Cost ("SAC") case. Second, NS shares SMEPA's desire to get a prompt, authoritative resolution – from the agencies responsible for administering transportation security information regulations—of the Sensitive Security Information ("SSI") issues and concerns that have prevented NS from producing that traffic and event data, so that this case may proceed on schedule. Third, NS agrees that the Board has broad authority over rail rate cases and discovery, so long as the matter in question is within the Board's jurisdiction and responsibility and the Board's exercise of its authority does not conflict with other law or requirements. Finally, NS agrees that, once the responsible

agencies resolve the security-related questions, NS should produce traffic and event data expeditiously.

In short, NS agrees that traffic and event data that are the subject of SMEPA's motion are important and relevant to this case, and NS joins SMEPA in urging the responsible agencies to issue a decision on the SSI issues as soon as possible. In anticipation of an order authorizing production and explaining how and under what conditions that disclosure may take place, NS has completed the very time-and-resource-intensive work necessary to develop and prepare the traffic and event data requested by SMEPA[1]. NS stands ready to produce that data as soon as NS is advised that it may do so.

Where NS and SMEPA disagree is on whether NS should produce data that is clearly relevant and necessary to the rate case before the STB, the Transportation Security Administration ("TSA"), and the Federal Railroad Administration ("FRA") resolve the proper way to provide that information, particularly in light of the risk of TSA or FRA assessing civil penalties or taking other enforcement action if they find SSI has been improperly disclosed. Because governing SSI regulations and policies are promulgated, administered, and enforced by the FRA and the TSA, those responsible agencies should be involved in determining: (i) whether traffic and event data showing detailed routing information for Toxic By Inhalation ("TIH") and other dangerous commodities is (as NS believes) SSI; (ii) how such SSI may be produced to SMEPA's representatives in this litigation; (iii) who may have access to that information and under what conditions; (iv) how it may be used in evidence filed in this case; (v) what protections against disclosure of that information must be taken by those who may be granted access to the information; and (vi) any other requirements or limitations on the disclosure or use

[1] NS does not maintain the data in the requested form in its normal course of business.

of the information, including the use of "compilations" of data in the parties' evidentiary submissions.[2] Once NS receives necessary authorization and direction from the three agencies concerning the production and use of relevant traffic and event records in this rate case, it will produce those records and data forthwith.

SMEPA's suggestion that NS's concern about unauthorized disclosure of SSI is trivial or insubstantial is belied by the very fact that it has taken FRA and TSA months to resolve the issue. If this were a simple or trivial question or concern, surely those agencies would have disposed of it quickly. If as SMEPA speculates, the data in question were clearly not SSI, the agencies presumably would have made that determination quickly and so advised the Board and the parties. Despite the best efforts of the three agencies, FRA and TSA have not yet provided the written decision they had hoped and planned to deliver nearly three months ago. Plainly, this indicates the issues and concerns NS has raised about the production and use of SSI in a SAC case are legitimate and resistant to simple resolution.

I. THE BOARD, FRA AND TSA SHOULD ALL BE INVOLVED IN PROVIDING GUIDANCE ON HOW TO PRODUCE SSI INFORMATION IN THIS RATE CASE.

The Board has broad authority to regulate, oversee, and determine rail rate reasonableness cases. If the data in question did not involve SSI or other legal prohibition on its disclosure, the Board would certainly have the power to compel NS to produce such relevant data in a SAC case. Indeed, the Board would not have to compel production because NS concedes it is relevant and necessary to the litigation of the case, and absent the SSI issues, is properly discoverable. However, requirements and limitations that govern what is SSI, the

[2] *See, e.g.* Rail Transportation Security, 73 Fed. Reg. 72130, 72146 (Nov. 26, 2008) (TSA concluded that compilations of location and shipping information "will constitute SSI . . . Such compilations will require greater protection than the information maintained by the railroad carrier for its business purposes. . .").

disclosure of SSI, and the protections those in possession of this information must take are issued and enforced by the TSA and the FRA. Regulations governing the identification, use, protection, and disclosure of SSI generated, obtained, or maintained by rail carriers and other transportation service providers were promulgated by the U.S. Department of Transportation ("DOT") and by the U.S. Department of Homeland Security ("DHS"). *See* 49 U.S.C. §§ 114(s), 40119; 49 C.F.R. Part 15 (DOT); 49 C.F.R. Part 1520 (DHS).

For railroads, the FRA is responsible for interpreting and applying the DOT regulations, and the TSA is responsible for the DHS regulations. Rail carriers and other "covered persons" who have access to SSI are charged with a variety of duties to secure, maintain, and protect SSI, and to ensure that they do not disclose SSI to persons other than covered persons with a "need to know" that information, as defined by TSA and FRA regulations. *See, e.g.*, 49 C.F.R. § 1520.3 1520.13. FRA and TSA are also charged with determining what information constitutes SSI. *See* 49 C.F.R. § 1520.5 (enumerating various specific types of SSI and providing for the designation as SSI of other information whose public disclosure "might be detrimental to the security of transportation"). Unless authorized by TSA or FRA, covered persons (including rail carriers) may not disclose SSI to anyone but a "covered person" having a "need to know" the information in question. *See id.* at § 1520.9(a)(2). Covered persons or others who disclose SSI without authorization are subject to civil penalties and other enforcement actions by DHS and DOT. *E.g., id.* at § 1520.17.

The TSA and FRA determine whether information is SSI, whether a person or entity has a "need to know" such SSI, and whether to authorize a covered person to disclose that information to a person who is either not covered or lacks a "need to know" within the meaning of SSI regulations. NS has simply asked the STB, TSA, and FRA to adopt a coordinated,

consistent approach that will permit NS to provide the traffic data to SMEPA for purposes of the rate case without risking sanctions for violation of SSI regulations.

SMEPA's arguments to the STB about the proper application of other agencies' regulations and how they should be applied simply miss the point. The reason that NS sought the involvement of TSA and FRA as soon as it determined important SAC case data contained SSI is its recognition that determination of SSI issues are issues governed by their regulations, not those of the Board. Accordingly, NS raised the issue with SMEPA and with the Board at its earliest opportunity, more than two months before the scheduled close of discovery. At the time, NS anticipated that consultation between the Board, FRA, and TSA at this relatively early juncture would afford ample time for those agencies' resolution of how to provide the SSI information for use in this rate case As the Motion acknowledges, SMEPA too understood that FRA and TSA would resolve the issues in a written document to be issued "within approximately one week of the meeting" between representatives of the parties to two affected rate cases, STB, FRA, and TSA. Motion at 8.

SMEPA essentially concedes that NS followed the proper course by requesting that the STB, FRA, and TSA work together to resolve the issue of disclosure of SSI contained in traffic and event data sought in rate case discovery. As SMEPA summarized, where issues partially concerning matters within the Board's authority also implicate matters that are the responsibility of other agencies (and outside the authority of the Board), the "recognized rule is that the agencies 'coordinate and cooperate with each other as appropriate' with a recognition of one another's roles and expertise." Motion at 10. Because the "role" and authority to determine SSI questions and issues resides with FRA and TSA, the only appropriate course under the established rule articulated by SMEPA is for FRA and TSA to determine the SSI issues after

consultation with the Board. NS shares SMEPA's frustration with the time it has taken to resolve the SSI issues, and urges the Board, TSA, and FRA to provide guidance promptly on how to produce the traffic data that is necessary for this litigation.

II. THE BOARD'S PROTECTIVE ORDER DOES NOT ADDRESS SSI ISSUES, AND DOES NOT PROVIDE THE PROTECTION REQUIRED BY SSI REGULATIONS.

SMEPA asserts that the Protective Order issued by the Board in this case adequately addresses SSI concerns and implements "functionally equal" safeguards to those required by SSI regulations. Motion at 17-18. That is far from clear to NS, which is one of the reasons it raised this issue months ago. Not surprisingly given the Board's lack of authority and experience with SSI, no provision of its Protective Order discusses SSI, provides for its designation as "Highly Confidential," or addresses who may have access to SSI, or the conditions on its disclosure or use. The Protective Order is directed at protecting information that is "proprietary," "commercially sensitive," or "competitively sensitive" such as "material containing specific rate, traffic, or cost data." The entire focus of the Protective Order is on protecting the commercially sensitive, business confidential, or proprietary information of rail carriers and their customers. It simply does not address information concerning security matters governed by regulations of other agencies. Thus, contrary to SMEPA's suggestion, the Board's Protective Order issued by the Board in this case neither addresses SSI nor provides for its designation as "Confidential" or "Highly Confidential."

The Protective Order also provides no conditions on the circumstances in which an outside consultant or counsel to a party may be given access to SSI. There is no requirement, beyond signing the Highly Confidential undertaking, that such persons are "covered persons" or demonstrate a "need to know" as required by SSI regulations or undergo the background check

or other qualifying procedures sometimes required by FRA and TSA prior to disclosure of SSI. *See, e.g.*, 49 C.F.R. § 1520.11(c).

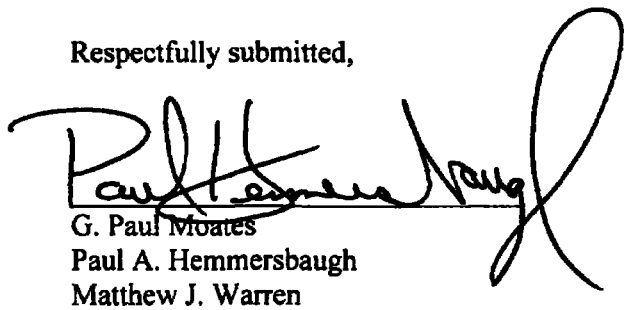
Moreover, the Protective Order provides for none of the SSI labeling or physical security requirements that FRA and TSA impose on persons having SSI. For example, TSA regulations require a specific SSI protective marking on each and every page of a document, as well as a "distribution limitation statement" and warning listing applicable regulations and the prohibition against sharing the information to a person without a "need to know" without written permission of the TSA Administrator or the Secretary of Transportation. 49 C.F.R. § 1520.13.[3] Electronic documents and information must be similarly labeled. *Id.* Further, every person to whom SSI is disclosed has a duty to safeguard that information from further disclosure by either keeping it in her physical possession or storing it in a secure, locked container. 49 C.F.R. § 1520.9. The Board's Protective Order contains no provision for SSI labeling and warnings or protection of the physical security of documents containing SSI.

[3] SMEPA's unsupported claim that NS does not "follow the regulatory protocols for handling SSI" is baseless and incorrect. NS takes SSI regulations very seriously and has developed extensive procedures and protocols to ensure it is in compliance with SSI regulations and "protocols." Contrary to SMEPA's "assumption," NS handles SSI – including the traffic and event data for TIH traffic – in accordance with the requirements of applicable SSI regulations.

CONCLUSION

SMEPA's Motion to Compel should be denied as premature because FRA and TSA have not yet provided written guidance for how to produce this information that is necessary for this rate case. NS joins SMEPA in urging the Board, the FRA, and the TSA to act expeditiously to jointly resolve this issue.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August 2011, I caused the foregoing Norfolk Southern Railway Company's Reply to SMEPA's First Motion to Compel Discovery to be served by first class mail and/or electronic mail on counsel for Complainant South Mississippi Electric Power Association:

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